



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

July 2, 2020

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Jere Upsher**
Tax Registry No. 947083
Queens Court Section
Disciplinary Case No. 2017-18271

The above named member of the service appeared before Assistant Deputy Commissioner Paul M. Gamble on January 14 and 17, 2020, and was charged with the following:

DISCIPLINARY CASE NO. 2017-18271

1. Said Police Officer Jere Upsher, assigned to Transit District 2, while off-duty, on or about November 28, 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Upsher was involved in a physical altercation with [REDACTED] less than [REDACTED]. (As amended)
P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

2. Said Police Officer Jere Upsher, assigned to Transit District 2, while off-duty, on or about November 28, 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Upsher knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen (17) years old. (As amended)
P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

In a Memorandum dated March 3, 2020, Assistant Deputy Commissioner Paul M. Gamble found Police Officer Jere Upsher Guilty of all Specification in Disciplinary Case No. 2017-18271. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of the circumstances and issues concerning the misconduct for which Police Officer Upsher has been found Guilty and deem that separation from the Department is warranted. However, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for Police Officer Upsher at this time.

The facts alleged in this case convincingly paint a picture of a physical struggle between Police Officer Upsher and her [REDACTED]. Furthermore, the physical evidence presented at the Department Trial corroborates witness and victim testimony that the victim sustained physical injuries as a result of the assault perpetrated by Police Officer Upsher. Given the severity of the alleged altercation between Police Officer Upsher and her own [REDACTED], the proposed penalty is wholly inadequate.

It is therefore directed that an *immediate* post-trial settlement agreement be implemented with Police Officer Upsher in which she shall forfeit thirty-three (33) suspension days without pay (already served), forfeit thirty (30) suspension days without pay (to be served), forfeit seven (7) vacation days, be placed on one (1) year dismissal probation, cooperate with counseling, waive all time and leave balances, including terminal leave, and immediately file for vested-interest retirement.

Such vested-interest retirement shall also include Police Officer Upsher's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Police Officer Upsher does not agree to the terms of this vested-interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented **IMMEDIATELY**.



Dermot F. Shea
Police Commissioner



POLICE DEPARTMENT

March 3, 2020

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In the Matter of the Charges and Specifications : Case No.
- against - : 2017-18271
Police Officer Jere Upsher :
Tax Registry No. 947083 :
Queens Court Section :
-----X-----

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Craig Hayes, Esq.
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New York, NY 10038

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Jere Upsher, assigned to Transit District 2, while off-duty, on or about November 28, 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Upsher was involved in a physical altercation with her [REDACTED]. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 CONDUCT PREJUDICIAL

2. Said Police Officer Jere Upsher, assigned to Transit District 2, while off-duty, on or about November 28, 2017, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer Upsher knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen (17) years old. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 CONDUCT PREJUDICIAL

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 14 and 17, 2020. Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Seraphim De LaCruz, Police Officer Brandon Agosto, Sergeant Adam Triolo, Police Officer Stephanie Toussaint, and Sergeant Ivan Acevedo as witnesses. The Department also offered the statements of Minor A and Person 1 in evidence. Respondent testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct and recommend that she forfeit 33 suspension days previously served, an additional 30 suspension days and that she serve a one-year period of dismissal probation.

ANALYSIS

The following is a summary of the facts which are not in dispute. On November 28, 2017, Minor A, [REDACTED] was at home inside [REDACTED] [REDACTED]. At about 1930 hours, Minor A and Respondent engaged in a verbal altercation, the circumstances of which are in dispute. At the time of the

altercation, Minor A [REDACTED]. Person 2, and at least one of her [REDACTED] were also home. The altercation ended when Minor A left the apartment; the parties dispute whether she was physically thrown out by Respondent or departed on her own volition. Minor A spent the night at the apartment of her friend [REDACTED], which is located across the hallway from her own apartment. Respondent became aware that Minor A was staying at the friend's apartment and spoke with the friend's mother at least twice by telephone; once that evening and again the next morning.

At approximately 0645 hours the next morning, Respondent had a telephone conversation with the friend's mother in which she discussed Minor A returning to her apartment to prepare for school that day. Minor A returned to her apartment for a brief period and spent time in her bedroom before leaving to go to school. The parties dispute whether Minor A and Respondent had another verbal confrontation while she was home.

Sometime during the school day on November 29, 2017, Minor A had a discussion [REDACTED]

[REDACTED]
[REDACTED] advised Minor A that a representative of the Administration for Children's Services would be in contact with her before the end of the school day; the [REDACTED] further advised her that if she did not feel safe returning home, she should go to her [REDACTED] home. [REDACTED] resides at [REDACTED] - [REDACTED] Minor A did not return home that evening, going to her [REDACTED] home instead. She apparently discussed the November 28, 2017 altercation with [REDACTED], who called 911. Police Officers Brandon Agosto and Stephanie Toussaint of the [REDACTED] Precinct responded to the call at approximately 2030 hours.

Police Officers Agosto and Toussaint conducted a preliminary investigation at [REDACTED] 's home. [REDACTED] was interviewed by Police Officer Agosto, while Minor A was interviewed by Police Officer Toussaint in a different room. Police Officer Toussaint observed a bruise on Minor A's [REDACTED] which she photographed using her Department telephone¹. Minor A and Ms. Colin were transported to the [REDACTED] Precinct, where Police Officer Agosto prepared a Domestic Incident Report (Department Exhibit 5), as well as a Complaint Report (Department Exhibit 6).

Respondent was summoned to the [REDACTED] Precinct, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

[REDACTED] (*Id.*). The [REDACTED] issued a Temporary Order of Protection, ordering Respondent to: (1) stay away from Minor A's school and home; (2) have no contact with Minor A or initiate any third party contact; and (3) surrender any and all firearms to her local precinct (Department Exhibit 2).

At issue in this case is whether Respondent engaged in a physical altercation with [REDACTED]. Also at issue is whether Respondent engaged in conduct which was likely to be injurious to the physical, mental or moral welfare of [REDACTED].

¹ Police Officer Toussaint was unable to produce the photograph she took, as any data saved on her Department phone was discarded when she obtained a new telephone instrument.

The following is a summary of the relevant trial evidence.

The Tribunal received the November 30, 2017, statement of Minor A in evidence (Department Exhibit 7). In her statement, Minor A asserted that she returned from school at approximately 1230 hours on November 28, 2017, because she was experiencing pain from a muscle she had pulled the previous Monday during dance class. She sought, and received, permission from Respondent to leave school early. Once she arrived at her home, she went to sleep for a time; when she awakened, she began cleaning her room. Minor A asserted that “[her] job” was to clean the apartment, doing dishes, laundry, sweeping and cleaning the bathroom (*Id.* at 10). Sometime thereafter, Respondent and Person 2 [REDACTED], arrived home (*Id.* at 1-2).

At some point, Minor A heard Respondent and Person 2 engaging in a verbal disagreement regarding financial matters (*Id.* at 2). From Minor A’s perspective, she and her [REDACTED] do not have a good relationship (*Id.* at 13). Person 2 eventually left the apartment and Respondent took a nap. Respondent eventually woke up and directed Minor A to pick up her [REDACTED], Minor B², as Person 2 had declared that he was not going to. Minor A left the apartment, picked her [REDACTED] up, then returned. Sometime after she returned, Respondent took Minor B into the bathroom to give her a bath; Minor A remained in her room sorting laundry (*Id.* at 2-3).

At approximately 1930 hours, Respondent entered the bedroom and asked for her iPad; according to Minor A, she saw the iPad and picked it up. At that point, Respondent noticed that someone had sent text messages to Minor A on the iPad. When Respondent asked Minor A

² [REDACTED]
[REDACTED].

who the sender was, she responded, [REDACTED] Respondent questioned, "Who's that," to which Minor A responded, "[REDACTED] it's the same person, I told you who it was before." Respondent then asserted that this was the first time she had heard of [REDACTED] and Minor A continued to assert that she had previously discussed him with Respondent. Respondent replied, "Oh, you don't respect anybody. You and [REDACTED] don't treat me right. I'm going to leave you all here. I don't have time to put up with you all." Respondent then asked Minor A to give the iPad to Minor B., which she did. Minor A took the iPad back from her [REDACTED] after she had played with it for a while; Respondent then asked her who put in the passcode to the iPad. Minor A denied knowing who had done so. Respondent took the iPad and appeared to be operating it, then said, "Oh, you're just playing games. You want to play with me like I'm stupid. You don't know what you're talking" (*Id.* at 3)

Minor A asserted in her statement that Person 2 came into her bedroom after he had argued with Respondent, but then left when she and Respondent began arguing (*Id.* at 13). According to Minor A, [REDACTED]³ returned at some point during the argument and interjected, "Babe, I don't understand why you're talking to her. You know she's hard headed. You know she's stupid. She doesn't listen or retain information." Respondent told Person 2, "Stay out of it; I got it. I got it." Respondent then said, "I can't take it no more; get out, get out!" Minor A was sitting on the floor crying and heard Respondent again say, "Get out, Minor A replied, "[REDACTED], can I just talk to you?" Respondent again told Minor A to "get out" and grabbed her by her hair, pulling her from her bedroom. Minor A used her feet and held onto a door in an attempt to prevent herself from being pulled along, while asking Respondent, "[REDACTED], can you please stop?" Minor A stopped in the hallway between her bedroom and the

³ Person 2 returned to the apartment at some point after the argument began, but Minor A did not specify what time that was in her statement.

bathroom for a few moments, during which time Respondent appeared to calm down. Respondent then began punching Minor A in her chest and held her down so that she was immobilized, while kicking Minor A's left leg (*Id.* at 4-5). Minor A claimed that Respondent hit her in her head with the iPad while she was in her bedroom; while the blow did not leave a mark, the force of the blow was sufficient to crack the iPad screen (*Id.* at 13-14). Minor A also recalled Respondent punching her in her stomach but asserted that the punch left no mark (*Id.* at 14).

Respondent eventually stopped, and walked into Minor A's room, where she picked up Minor A's sneakers. According to Minor A, Respondent opened the apartment door, threw her sneakers into the hallway, before returning to Minor A and dragging her out of the apartment by her hair (*Id.* at 6). Minor A stated that this was not the first time that Respondent had put her out of their apartment but that in the past, she knocked afterward and was allowed to re-enter (*Id.* at 12). While Minor A had a key to her apartment, she did not have it with her at that moment; instead of knocking on her own door, she knocked on the door to her friend the friend's apartment and entered (*Id.* at 7, 12). She took a shower and the friend's mother washed her clothing (*Id.* at 7).

In Minor A's statement, she asserted that at 0645 hours the next morning, Respondent called the friend's mother and told her to "send Minor A across so she can [REDACTED] [REDACTED] (*Id.* at 8). Minor A conceded that [REDACTED] [REDACTED] was something she regularly did (*Id.*). She knocked on the door to her apartment and was let inside; she then proceeded to her bedroom. While trying to [REDACTED], Minor A was unable to find Minor B's uniform pants, opining that they were unavailable because she had not been at home to lay them out from the night before. Respondent then became upset, saying, "Oh you went to – doing nothing," then began removing

clothing from her dresser and throwing it at her. Respondent said, "You're not going to school today; you're going to stay to clean my house until it's spotless" (*Id.* at 9). Minor A did go to school, and during the school day, reported the previous interactions with Respondent to her guidance counselor (*Id.* at 14).

The Tribunal received the November 5, 2018, statement of Person I in evidence (Department Exhibit 4). Person I is an ACS investigator who was assigned to Minor A 's case (*Id.* at 1). In her statement, Person I asserted that when she interviewed Minor A on November 29, 2017, regarding the November 28, 2017 incident, she observed a bruise on Minor A's [REDACTED] [REDACTED] (*Id.* at 2-6). Her understanding was that Respondent had punched Minor A in her chest approximately three times (*Id.* at 3). She photographed Minor A's [REDACTED] and the photographs were received in evidence (Department Exhibit 3A).

Person I recalled Minor A complaining that her head was sore and that Respondent had hit her in the head with a tablet (*Id.* at 5). She was informed that Minor A was treated at [REDACTED], but was only given an ice pack for her head (*Id.*). Person I- did not observe any bruising on Minor A's head but explained that Minor A had "a lot of hair" (*Id.*). She also did not notice any injury to Minor A 's leg (*Id.*). Person I confirmed that pursuant to a Family Court determination, Minor A was not going to return home; instead, she was going to reside with [REDACTED] (*Id.* at 9).

A Domestic Incident Report prepared by Police Officer Agosto was received in evidence (Department Exhibit 5). In the report, Minor A made a statement under the penalties for false statements under Penal Law section 210.45, dated November 29, 2017 (*Id.*). In her statement, she asserted the following:

Yesterday, [REDACTED] and I got into an argument then [REDACTED] grabbed the iPad and hit it against my head. After she dragged me out of my room into the hallway while I tried to grab onto anything to make her stop. As she dragged me fully into the hallway she locked the door and told me to leave. So as a result, I went to my friend's house across the hall to sleep. [REDACTED] also punched me in my left breast, left leg and in my stomach.

(*Id.* at 2).

Respondent testified that in the timeframe surrounding the alleged incident, her relationship with Minor A was "stressed," because of issues with Minor A reporting for classes in a timely manner, as well as Minor A 's relationship with a boy (T. 126-127). On the date of the incident, Respondent was bathing Minor B., while Minor A was in the bedroom she shared [REDACTED] (T. 129-130). After Respondent completed Minor B 's bath, she walked across the hallway, entered Minor A 's room and claimed that she heard Minor A pushing something behind a dresser (T. 130-131). Respondent asked her what she put behind the dresser and Minor A responded, "Nothing" (T.131). Respondent replied. "I heard something go behind the dresser; stand up" (*Id.*). When Minor A stood up, Respondent observed an Apple charging cord plugged into the wall socket; when she reached behind the dresser, she found her iPad tablet, which she permitted Minor A to use (T. 131-132, 134). At the time of this incident, Minor A was "grounded," one of the conditions of her punishment being that she was forbidden from using any electronic devices (T. 132-133). As Respondent examined the tablet, she saw emojis⁴ in a text message window from "My Man" (T.134).

Respondent asked Minor A to whom she was speaking and demanded that she "open the iPad" so that she could see the content of the messages and "know what [she was] discussing" (*Id.*). Later in her testimony, Respondent asserted that "... for them to talk and text, at that

⁴ Emojis are written symbols and smileys used in electronic messages as opposed to words.

point, it was fine for them to talk and text, but if they wanted to go out on a date, then we would have – we would have to meet them – meet him" (T. 160).

Minor A refused to open the tablet; Respondent then attempted to input her passcode but it did not unlock the tablet (T. 135). Respondent asked Minor A 2-3 more times to unlock the tablet; each time she refused (*Id.*). Minor A then began crying and said that she did not want Respondent to see what was on the tablet (*Id.*). Respondent and Minor A went back and forth, with her demanding to have the tablet unlocked and Minor A refusing to do so (T. 136). According to Respondent, Minor A eventually attempted to grab the tablet from her grasp, but she pulled it back and held it against her chest before walking out into the living room (*Id.*).

Respondent testified that by this time, Minor A was "crying hysterically" and "yelling" as she followed her into the living room; Respondent asked her again whether she would unlock the tablet (T. 137, 139, 178). Under questioning by the Tribunal, Respondent confirmed that Person 2 was in the living room while this transpired, but asserted that he neither saw nor heard anything:

THE TRIBUNAL: Okay. Was he able to see what transpired between you and Minor A?

RESPONDENT: No.

THE TRIBUNAL: Was he able to hear what transpired between you and Minor A?

RESPONDENT: From what he said, no.

THE TRIBUNAL: From what he said?

RESPONDENT: Yes.

(T. 207).

Respondent claimed that Minor A told her that she wanted to explain to her what was on the tablet before showing it to her; Minor A agreed but kept crying without unlocking the tablet

(T. 137). Respondent also testified that as Minor A walked into the living room, she was placing some sort of footwear on her feet (*Id.*). Minor A then went to the front door and unlocked it; when Respondent asked her where she was going, Minor A replied that she was "going to cool off at [REDACTED]'s" (T. 138). Respondent then called the friend's mother, who confirmed that Minor A was indeed inside her apartment (T. 141). Respondent testified that she asked the friend's mother to call her when Minor A was coming back across the hall (*Id.*).

Respondent denied having any physical contact with Minor A other than wrestling the tablet back from her in the bedroom (T. 139). She specifically denied dragging Minor A out of the apartment, hitting her in the head with the tablet or punching⁵ her anywhere on the body (T. 139-140). Respondent further denied that the friend's mother ever confronted her about an alleged assault upon Minor A (T. 141-142). Respondent further asserted that no police ever responded to her apartment that evening⁶ (T. 142).

Respondent testified that Minor A did not return to the apartment and spent the night at the friend's apartment; she called the friend's mother the next morning to ask her to "tell Minor A to come across the hall so she can shower and get ready for school" (T. 144). Respondent added that Minor A usually takes Minor B to school before she proceeds on to her own school (T. 144-

145). Respondent claimed that when Minor A entered the apartment, she was in the living room; Minor A did not speak to her but "darted past" Respondent into her bedroom (T. 145). Minor A eventually left for school without speaking to Respondent and did not take Minor B to school (T. 145-146). Respondent asserted that when she entered Minor A's bedroom after

Referring to November 28, 2017.

⁵

The trial transcript makes reference to "pushing," but that transcription conflicts with the Tribunal's recollection of the testimonial evidence.

⁶

Minor A left the apartment, the room was in disarray, "as if she was looking for something" (T. 145).

Respondent asserted that at about 1900 hours, she had not heard from Minor A, past the time her after-school activities would have concluded, so she contacted the friend mother to see if Minor A had contacted her; while she was on the call with the friend's mother, an ACS investigator came to her apartment (T. 146-147). The ACS worker informed Respondent that a mandated reporter had stated that there was suspected neglect in her home and asked Respondent whether she had had an altercation with Minor A (T. 147). According to Respondent, she started explaining the situation at home with Minor A but before she could finish her explanation, the ACS worker ended the conversation, stating, "I know how kids can be; we're going to reach out to her also. I just wanted to make sure everything's okay in the home" (T. 147-148). The ACS worker then "checked the cabinets, checked the rooms and the 'fire detector' and then -left" (T. 148).

Respondent testified that she later learned that Minor A was at that moment at her [REDACTED] home. She confessed that she has no real relationship with Minor A's [REDACTED] because when Minor A was approximately six months old, and she resided at the [REDACTED] home, the [REDACTED] supposedly "exhibit[ed] behavior as if she wanted my [REDACTED]" (T. 149). The [REDACTED] eventually asked Respondent explicitly "to give up Minor A" (*Id.*). According to Respondent, she refused, then moved out of the [REDACTED] home, never to return or have any communication with her (*Id.*). While Respondent's [REDACTED] was alive, she acted as an intermediary between Minor A and her [REDACTED] so that they could have contact (T. 211-212). Respondent testified that Minor A continued to reside with her [REDACTED] until she went away to college in the fall [REDACTED] (T. 157).

Once the ACS worker departed, Respondent called her PBA delegate; in the midst of the telephone conversation, he informed Respondent that her Commanding Officer had directed her to report to her command. The delegate called Respondent back approximately five minutes later to advise her that instead of proceeding to her command, she should instead report to the [REDACTED] Precinct (T. 149-150). When she asked why she had to go the [REDACTED] Precinct, the delegate informed her that [REDACTED] had called 911 (T. 150-151).

When she responded to the [REDACTED] Precinct, Respondent was advised by her delegate that the investigators were looking into a bruise on Minor A's knee. Respondent testified that the injury to Minor A's knee occurred "the Sunday night before or the Monday night before" as she stumbled while climbing into her bunk bed; she also claimed Minor A left her dance class the Tuesday before the incident because of the injury (T. 152-153).

Respondent testified that she believed Minor A fabricated an allegation of being assaulted by her as an act of rebellion, motivated in part by her desire to date, as well as issues with school. Respondent had agreed that Minor A could date once she turned [REDACTED] on the condition that she and [REDACTED] meet anyone Minor A was interested in dating. According to Respondent, Minor A refused to allow her to meet [REDACTED]. Respondent also testified that Minor A's [REDACTED] did not have many rules (T. 158-161).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than the task of attempting to reconstruct the most probable nature of a past event on the basis of conflicting accounts. This is further complicated when one of the accounts is in the form of hearsay evidence. While the law creates the framework within which such evaluation is accomplished, the ultimate determination of which account to accept depends almost solely on

an assessment of witness credibility. That assessment remains the exclusive province of the fact finder.

In making such an assessment, the trier of fact should consider a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness accounts are logical and comport with common sense and general human experience.

In this case, untangling the truth from the record is particularly onerous because Respondent and Minor A have a complicated relationship. At the time of the alleged incident, Minor A resided with Respondent, [REDACTED] [REDACTED]. The dynamics of blended families are often as different as the families themselves. Finally, judging the merits of any parenting style must be done objectively.

At the time of this incident, Minor A's economic interests were inexorably intertwined with Respondent's; she has since graduated from high school and has matriculated at a residential college. It is unclear what financial support, if any, Respondent still provides for her. Respondent, like any other Member of Service, could jeopardize her own career by making false statements.

As an overlay to this dynamic are the particular complexities of assessing allegations of domestic assaults. This Tribunal is aware that it is often difficult for victims to report an assault by a family member. In fact, even after taking the step to file a report, it is not unusual for victims to withhold what they consider to be embarrassing details and sometimes opt out of continuing participation in the criminal or disciplinary process. The emotional complications of

bringing such charges, however, must always be weighed against Respondent's due process right to have all evidence suggesting that the incident did not occur fairly evaluated and considered. It is within this context that I make the following findings of fact.

I find Minor A 's hearsay statement to be credible and reliable, as it contains material factual assertions which were corroborated by other witnesses or by other independent evidence in the case.

The material portions of Minor A's statement appear to be consistent with the declarations she made from the first report of the incident to her sworn statement given two days after the event. The essence of the allegation is credible and plausible: her [REDACTED] lost her temper after Minor A's refusal to surrender the passcode to a tablet which would reveal communications she probably never intended to disclose to her. Her [REDACTED]'s reaction went from a verbal diatribe to a physical assault, culminating in being thrown out of her home. While the Tribunal will not pass judgment on whether Respondent should have sanctioned Minor A for the violation of her parental rules, the extreme nature of her response is one unlikely to be contrived.

Moreover, Minor A's pleas of, " [REDACTED] can you please stop" and " [REDACTED] can I just talk to you" bear the ring of truth. It is logical, in the view of the Tribunal, for a [REDACTED] to address a supposedly loved adult with a habitual term of endearment even in a discordant scenario where that same adult is their assailant.

The evidence supports a finding that Minor A 's first report of this incident was made the next day to her [REDACTED], who is a mandated reporter of any information of which she becomes aware that a child's well-being is possibly in jeopardy. Minor A also told her [REDACTED], as evidenced by her [REDACTED] calling 911, when she had no personal

knowledge of an alleged assault against minor A then told Police Officer Toussaint and eventually Police Officer Agosto, leading to the filing of a Domestic Incident Report, as well as a

[REDACTED] In sum, minor A reported the incident and the circumstances under which it unfolded to at least four and perhaps five adults on November 29, 2017. I find this timeline to be consistent with a candid recitation of the facts in close temporal proximity to the events themselves.

In contrast, I find Respondent's testimony to be self-serving, illogical and unreliable. It was, in part, internally inconsistent: the precipitating event for the altercation was the discovery of text messages sent to minor A by a young man. By Respondent's own testimony, she demanded access to the locked tablet to learn the contents of the messages to the point of provoking a strong emotional response from her [REDACTED] yet she also professed that talking and texting between minor A and the young man was "fine."

Her testimony was also self-serving, in that she appeared to minimize the significance of the appearance of an ACS worker at her apartment. She asserted that she never had the opportunity to provide a complete narrative of what transpired between her and minor A because the ACS worker cut her off, saying "Oh, you know how kids can be." She further attempted to cast doubt upon minor A veracity by asserting that she fabricated an assault, telling the false story to a guidance counselor, an ACS investigator, a police officer and a [REDACTED] investigator in a fit of teenage rebellion.

Finally, there are portions of Respondent's testimony which implausible, based upon other evidence in the case or which were dubious on their face. For example, when confronted with the revelation that the police were investigating minor A 's claim of an injury to her knee, Respondent attempted to attribute the injury to an accidental fall while climbing into her bunk

bed. She further asserted that the injury prevented Minor A from attending dance class earlier that day. While Minor A also asserted that she had missed dance class that day, she specified that it was because of a pulled muscle. While it is possible that either Respondent or Minor A might be honestly mistaken, the possibility of an alternate source of injury only serves the interest of one witness, that being Respondent.

Respondent's assertion that her [REDACTED] was present in the living room, through which this tumultuous scene unfolded, and did not see or hear anything, gives the Tribunal pause. Respondent did not say that she had no idea whether he observed the altercation: she affirmatively stated that he did not. She then doubled down on that proposition by asserting that Person 2 had told her that he heard and saw nothing. It is more likely than not that this was a statement calculated to cast doubt upon Minor A 's veracity and that Respondent knew it to be false at the time she made it.

Specification 1: Engaging in a Physical Altercation

I find that the Department has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent engaged in a physical altercation with [REDACTED]. Minor A. I further find that the evidence establishes such conduct was to the prejudice of good order, efficiency or discipline of this Department.

The credible evidence in the record establishes that Respondent initiated a physical altercation with her [REDACTED]. Minor A . The altercation involved Respondent pulling Minor A by her hair from her bedroom, through the living room and eventually through the doorway to her apartment. Respondent also punched Minor A several times in her chest, causing bruising to her [REDACTED]. Both Police Officer Toussaint and ACS investigator Person 1 observed the bruising on Minor A 's [REDACTED]. Respondent also

kicked Minor A in her left knee, causing bruising which was observed by Police Officer Toussaint. Finally, Respondent hit Minor A over her head with an iPad tablet.

There is no evidence that Minor A was the aggressor. The physical force Respondent employed was unwarranted, even as a sanction for Minor A violating parental rules. Under these circumstances, Respondent's actions were to the prejudice of good order, efficiency and discipline in this Department

I therefore find Respondent Guilty of Specification 1.

Specification 2: Endangering the Welfare of a Child

I find that the Department has met its burden of proof by a preponderance of the relevant crucible evidence that Respondent endangered the welfare of a child under the age of 17.

While the Patrol Guide does not contain a provision governing the elements of this alleged misconduct, New York Penal law Section 260.10 is instructive:

"A person is guilty of endangering the welfare of a child when she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than 17 years old...."

The New York Court of Appeals held in *People v. Johnson*, 95 N.Y.2d 368 (2000), that the statute is applicable to conduct directed toward others that is likely to cause harm to children. The court held that "actual harm to the child need not result for [there to be] criminal liability," explaining:

"The adverse effects of domestic violence on children have been well documented over the past two decades and have been recognized by all branches of our government in New York. In 1996, the Governor approved an act to amend the Domestic Relations Law and the Family Court Act to require courts to consider domestic violence when rendering child custody and visitation determinations. He noted that "[t]he victims of domestic violence are not limited to those who are actually battered by spouses, for the evidence is overwhelming that those who batter their spouses inflict tremendous harm on their

children . . . [D]omestic violence causes great psychological and developmental damage to children even when they are not themselves physically abused" Governor's Approval Mem to L 1996, ch 85, 1996 McKinney's Session Laws of NY, at 1858, 1859). Some trial courts in child endangerment prosecutions have also explicitly recognized the overwhelming harm to children exposed to domestic violence . . .".

(*People v. Johnson*, 95 N.Y.2d at 372-373).

In this case, the credible evidence establishes that Respondent committed a physical act of violence upon her [REDACTED]. This act of violence was committed by Respondent as a means of forcibly ejecting her [REDACTED] from the family home in which she resided. The act was also committed in part, within the bedroom Minor A shared with her [REDACTED] [REDACTED], while Minor B was present. The record is silent as to whether Minor B personally witnessed the entirety of the physical altercation, but it is more likely than not she was able to hear, if not see, the tumult within her home.

While the physical effects of Respondent's violent acts against Minor A will certainly fade with the passage of time, it is less clear what the extent of possible psychological effects on Minor A or Minor B will be. Finally, the traumatic effect of either witnessing or being subjected to domestic violence is well-established.

Based upon the foregoing, I find Respondent Guilty of Specification 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. (*See Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 240 [1974]). Respondent was appointed to the Department on July 8, 2008. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has recommended a penalty of 33 suspension days previously served and a one-year period of disciplinary probation. Under the unique circumstances of this case, I find the recommended penalty to be insufficient.

The evidence in the record supports a finding that Respondent decided to eject her [REDACTED] from her home by force. As discussed above, it does not matter that Respondent may have genuinely believed that Minor A deserved to be disciplined for violation of her [REDACTED]'s rules. While this Tribunal has no desire to sit in judgment of Respondent's [REDACTED] choices, ejecting Minor A from her home in this manner was excessive.

Even if, for the sake of argument, the circumstances warranted a period of Minor A's removal from her family home, the manner in which Respondent chose to remove her from the premises was brutal and indefensible. The evidence supports a finding that Respondent hit Minor A over her head with a hard object, punched her repeatedly in her [REDACTED] kicked her and dragged her by the hair. There are no circumstances under which this Tribunal would countenance a Member of Service treating a criminal suspect in this manner, let alone a [REDACTED]

[REDACTED]. This conduct was committed in the presence of at least one of Respondent's other [REDACTED] [REDACTED] a factor which this Tribunal finds aggravating. In addition, the conduct was committed while Minor A [REDACTED] was in the apartment, creating an intolerable circumstance where Minor A would be justified in believing that no adult would come to her assistance.

Finally, I believe that Respondent made a knowingly false statement during her sworn testimony. When asked by the Tribunal whether her husband, whom she testified was home during the altercation, saw or heard what was transpiring between her and Minor A, she asserted, "No ... from what he said [to me], no." I find this factual assertion to be absurd on its face. Person 2 was certainly aware that there was an ongoing dispute between Minor A

and Respondent, as he inserted himself into it while they were in the bedroom. To accept Respondent's claim that while sitting in the living room, he was unable to hear as Respondent dragged Minor A through the apartment to the front door while beating her and Minor A was pleading with her [REDACTED] to stop, would require suspension of disbelief.

In *Disciplinary Case No. 2017-17313* (August 2, 2019), a 15-year Respondent with a prior adjudication for insubordination forfeited 30 suspension days previously served, an additional 30 suspension days and a one-year period of dismissal probation after being found guilty of: (1) engaging in a physical altercation; and (2) endangering the welfare of two children. The Police Commissioner directed that Respondent file for a vested-interest retirement from the Department after disapproving the recommended penalty of termination.

Accordingly, I recommend that Respondent be DISMISSED from the New York City Police Department but that her dismissal be held in abeyance for a period of one year pursuant to Section 14-115(d) of the Administrative Code, during which time she remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. I further recommend that Respondent forfeit 33 suspension days previously served, as well as an additional 30 suspension days.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JERE UPSHER
TAX REGISTRY NO. 947083
DISCIPLINARY CASE NO. 2017-18271

Respondent was appointed to the Department as a Police Officer on July 8, 2008, having previously served as a School Safety Agent from November 20, 2007, to July 7, 2008. On her three most recent annual performance evaluations, she received 3.0 overall ratings of "Competent" for 2015 and 2016, and a 3.5 rating of "Highly Competent/Competent" for 2014.

Respondent has no formal disciplinary history. In connection with the instant matter, she was suspended for 33 days immediately following the incident, and was thereafter placed on modified assignment on January 2, 2018. She was restored to active duty on February 4, 2020. Respondent was also placed on Level 1 Discipline Monitoring on December 8, 2017; that monitoring remains ongoing.

In January 2020, Respondent was served with Charges and Specifications on an unrelated matter.

For your consideration.



Paul M. Gamble
Assistant Deputy Commissioner Trials